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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 751

ROY T. MOBLEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Roy T. Mobley respectfully shows unto this Honorable Court:

A.

Summary Statement of Matter Involved.

The matter involved grew out of two suits based on disability benefits under two separate policies issued by the New York Life Insurance Company to the petitioner. These two suits were consolidated by the District Court for the purposes of trial and at the conclusion of all the evidence the trial court instructed the jury to find for the defendant.

Petitioner's declaration in the first suit is found at (Record 2-5 inc.) and a copy of the policies of insurance sued on is found (Record 5-38 inc.) the two policies of insurance being the same except as to the amounts payable thereunder.

The suits were for a breach of contract and alleged that while the policies were in force the petitioner became totally and permanently disabled and thereby became entitled to monthly disability benefits and a waiver of the premiums. That the company waived the premiums and paid the disability benefits up until January 13th, 1933, but thereafter it wilfully and wrongfully declined to make any further payments and notified him on March 1st it would not make any further payments under either of said policies.

That on March 9th petitioner employed his attorney to represent him and his attorney made demand on the defendant for the breach of the contract and that on March 17th defendant company re-affirmed its former decision and notified the plaintiff's attorney that it declined to make any further disability payments.

Petitioner further averred that at the time he was totally and permanently disabled and would be the remainder of his life, and further averred that the defendant refused to make payment of the premium or waive the premium that had become due on February 2nd, 1933. The policy provided for furnishing due proof of disability (Record 5) and the payment of semi-annual premiums (Record 6), and provided that double indemnity and disability benefits shall not apply to temporary insurance or paid up insurance provided under surrender values of the policy, (Record 7 & 10) and upon proof being submitted provided for the waiver of premiums and payment of disability (Record 8); "*Before making any income payment or waiv-*

ing any premium, the Company may demand due proof of the continuance of total disability but such proof will not be required oftener than once a year after such disability has continued for two full years.'' (Italics ours.)

"Upon failure to furnish such proof, or if the Insured performs any work • • • no further income payments shall be made nor premiums waived." (Record 9.)

And further provided that if it once defaulted that it could be reinstated on furnishing proof of good health (Record 13); and provided in the event of default of payment of premium after three years then certain benefits would apply (Record 22).

On the trial of the cause it was admitted that petitioner had been continuously, totally and permanently disabled within the meaning of the policy up until the date of the trial since his operation for appendicitis (Record 174). He was operated on for appendicitis December 30th, 1930 (Record 109).

The defense was that the company had not denied liability but had simply suspended payments under the policy and after the matter had been taken up by the attorneys for the petitioner with the company it later determined that it was in the wrong and made a tender of past due installments to the petitioner, which having been refused by the petitioner it tendered into court.

Petitioner's replication to this special plea was to the effect that the company had totally breached its contract and re-affirmed its breach by its letter dated March 17th, which letter is shown (Record 162), and by letter of April 13th, 1933, (Record 163), and that petitioner being entitled to performance of the contract the petitioner thereby had the right of election to either treat it as breach and sue for breach of the contract measured by the present cash value of all benefits under the policy under his life expectancy or he had the right to accept the monthly payments and

he elected to pursue the remedy for a breach of the contract.

The trial court peremptorily instructed the jury to return a verdict for the defendant. (Record 192.) The case was carried to the Circuit Court of Appeals and affirmed on January 16th, 1935. (Record 216.)

B.

Reasons Relied On for the Allowance of the Writ.

The reasons upon which a writ of certiorari should be granted are as follows:

1. The decision of the Circuit Court of Appeals in this cause is in direct conflict with the decisions of the Supreme Court of the United States in the following cases:

Pearce v. *Tenn. Coal & Iron Co.*, 173 U. S. 1, 43 L. Ed. 591.

Roehm v. *Horst*, 178 U. S. 1, 44 L. Ed. 953.

Lovell v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 28 L. Ed. 423.

2. The decision of the Circuit Court of Appeals in this cause is in direct conflict with the decisions of the Circuit Court of Appeals in the following cases:

Fed. Life Ins. Co. v. *Rasco*, 6th Circuit, 12 F. (2d) 693.

Mutual Reserve Fund Life Assur. Co. v. *Farrehbach*, 8th Circuit, 75 C. C. A. 304, 144 F. 342.

Prudential Ins. Co. of Am. v. *Faulkner*, 10th Circuit, 68 F. (2d) 676.

Colorado Yule Marble Co. v. *Collins*, 8th Circuit, 144 C. C. A. 376.

United Press Assn. v. *National Newspaper Assn.*, 8th Circuit, 150 C. C. A. 429.

Ætna Life Ins. Co. v. *Gehr*, 9th Circuit, 50 F. (2d) 657.

3. The decision of the Circuit Court of Appeals in this case is in direct conflict with the decisions of State courts in the following cases:

Ætna Life Ins. Co. v. *Phiefer*, 160 Ark. 98; 254 S. W., 335.

Indiana Life Endowment Co. v. *Reed*, 54 Ind. App. 450, 103 N. E. 77.

Knisely v. *Leathe*, 256 Mo. 341, 166 S. W. 257.

Milburn v. *Royal Union Mutual Life Ins. Co.* 209 Mo. App. 228, 234 S. W. 378.

Travelers Protective Assn. of Am. v. *Stevens*, 49 S. W. (2d) 365.

4. The decision of the Circuit Court of Appeals in this cause in affirming the judgment of the lower court failed to recognize the right of your petitioner to elect the remedy he desired to pursue for the breach of a contract by the defendant company at a time when petitioner was entitled to performance of the contract.

5. The defendant company by its letter of March 1st, 1933, (Record 159) and by its letter of March 17th, 1933 (Record 162), and its letter of April 13th, 1933 (Record 163), and its letter of June 5th, 1933 (Record 164), totally breached its contract and petitioner elected to treat it as a breach and filed suit for such breach.

The decision of the Circuit Court of Appeals in the instant case denies him that right.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its re-

view and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7469, Roy T. Mobley v. New York Life Insurance Company, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court and your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

ROY T. MOBLEY,
By SIDNEY C. MIZE,
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 751

ROY T. MOBLEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is found at page 211 of the record, and was rendered on January 16th, 1935. The opinion of the District Court is found at page 191 of the Record where the court ruled on the application of the defendant company for a peremptory instruction.

II.

Jurisdiction.

1.

Jurisdiction is invoked under the Judicial Code, Sec. 240, as amended by Act of February 13th, 1925; 43 Statutes at Large 938, Sec. 347 U. S. Ann. Code Vol. 28.

2.

Jurisdiction is sustained by *Forsythe* v. *Hammond*, 166 U. S. 506, 41 L. Ed. 1095; *Hamilton Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U. S. 251, 60 L. Ed. 629; *Bradford Electric Light Co.* v. *Clapper*, 284 U. S. 221, 76 L. Ed. 254; *Roehm* v. *Horst*, 178 U. S. 1, 44 L. Ed. 953; *Pearce* v. *Tenn. Coal & Iron R. R. Co.*; 173 U. S. 1, 43 L. Ed. 591, in this, that

(a) Decisions of this Court holding that an unqualified and positive refusal to perform a contract at a time when the promisee was entitled to performance and in giving to the promisee the right of election to treat such refusal as a breach of the contract were entirely ignored.

(b) Decisions of the Circuit Court of Appeals of the other Circuits announcing the principle of law set out above were entirely ignored and are in conflict with the decision of the court in the instant case.

3.

Petitioner advances these specific claims:

First: defendant company positively and unequivocally breached its contract on the 1st of March, 1933 (Record 159) advising that it would make no more payments under the policies and re-affirmed unequivocally that announcement

in its letter of March 17th, 1933 (Record 162) to petitioner's attorney, and by its letter to petitioner dated June 5th, 1933, (Record 164).

Second: having unequivocally breached its contract petitioner had the right to elect to sue on such breach and claim full damages for a breach of the contract or to sue monthly as each installment fell due, and having elected to treat it as a breach and claim full damages no conduct of the defendant company thereafter by admitting its wrong could deprive him of his right to sue for full breach.

Third: The trial court and the Circuit Court of Appeals in their decisions denying him full damages for complete breach denied him a right given to him under the law.

III.

Statement of the Case.

Reference is respectfully made to "A Summary Statement of Matter Involved," *supra*, in the petition for Certiorari.

IV.

Specifications of Error.

Specification No. 1.

1. The court erred in finding and holding that the United States District Court for the Southern District of Mississippi correctly directed a verdict for the defendant, because

(a) The letters dated March 1st, 1933, March 17th, 1933, June 5th, 1933 showed a positive and unequivocal breach of the contract at a time when the petitioner was totally and permanently disabled and entitled to monthly disability benefits as shown by its letters in its file at the time

that he was totally and permanently disabled and on the trial admitted that he was totally and permanently disabled on the above dates.

(b) No conduct of the defendant company after it had breached its contract could deprive petitioner of his right to claim full damages for the breach.

SPECIFICATION No. 2.

2. The court erred in finding and holding that in the instant case there was not a clear and unequivocal repudiation by the promisor of its agreement.

V.

Summary of Argument.

POINT "A".

First. The decision below is contrary to and in conflict with prior decisions of this Court;

Pearce v. *Tenn. Coal & Iron R. R. Co.*, 173 U. S. 1, 43 L. Ed. 591;

Roehm v. *Horst*, 178 U. S. 1, 44 L. Ed. 953.

Lovell v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 28 L. Ed. 423.

Second. The opinion of the Circuit Court of Appeals in the instant case is in direct conflict with decisions of the Circuit Court of Appeals of the Sixth Circuit, to-wit:

Federal Life Ins. Co. v. *Rasco*, 12 F. (2d) 693.

Of the Eighth Circuit:

Mutual Reserve Fund Life Assur. Co. v. *Farrenbach*, 75 C. C. A. 304; 144 Fed. 342.

Colorado Yule Marble Co. v. *Collins*, 144 C. C. A. 376, 230 Fed. 78.

United Press Assn. v. *National Newspaper Assn.*, 150 C. C. A. 429.

Of the Ninth Circuit:

Ætna Life Ins. Co. v. *Gehr*, 50 F. (2d) 657.

Of the Tenth Circuit:

Prudential Ins. Co. of Am. v. *Faulkner*, 68 F. (2d) 676.

Third. The opinion of the Circuit Court of Appeals is in conflict with the State decisions and the general law touching breach of contract involving mutual obligations on the part of the promisor and promisee:

Ætna Life Ins. Co. v. *Phiefer*, 160 Ark. 98; 254 S. W. 335.

Avery v. *Boden*, 5 E. L. & B. L. 714.

Barrick v. *Buba*, 2 C. B. N. S. 563.

Benjamin v. *Hilliard*, 23 Howard 149.

Carnig v. *Carr*, 167 Mass. 544, 35 L. R. A. 512.

Corpus Juris, Vol. 13, Section 725, page 651.

Daniels v. *Newton*, 114 Mass. 530.

Danube & B. S. R. R. Co. & K. Harbour Co. v. *Xenos*, 11 C. B. N. S. 152.

Danube & B. S. R. R. Co. & K. Harbour Co. v. *Xenos*, 13 C. B. N. S. 825.

East Tenn. V. & G. R. R. Co. v. *Staub*, 7 Lee 397, (Tenn.).

Grau v. *McVicker*, 8 Bliss 13, Fed. Case 5708.

Hancock v. *New York Life Ins. Co.*, Federal Case 6011.

Hinckley v. *Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 30 L. Ed. 967.

Hochster v. *De La Tour*, 2 E. L. & B. L. 678.

Indiana Life Endowment Co. v. *Reed*, 54 Ind. App. 450, 103 N. E. 77.

Knisley v. *Leathe*, 256 Mo. 341, 166 S. W. 257.

Miburn v. *Royal Union Mutual Life Ins. Co.*, 209 Mo. App. 228; 234 S. W. 378.

Nichols v. *Scranton Steel Co.*, 137 N. Y. 487, 33 N. E. 566.

Pakas v. *Hollingshead et al.*, 184 N. Y. 211, 77 N. E. 40.

Parker v. *Russell*, 133 Mass. 74.

Reid v. *Hoskins*, 6 E. L. & B. L. 593.

Schell v. *Plumb*, 55 N. Y. 592.

Travelers Protective Assn. of Am. v. *Stevens*, 49 S. W. (2d) 365.

Vicksburg & M. R. R. Co. v. *Putnam*, 118 U. S. 545, 30 L. Ed. 257.

POINT "B."

The facts shown by the record disclose a case where the defendant company on other occasions had breached its contract prior to the date of March 1st, 1933, but petitioner on those occasions had waived such breach and finally prevailed on the defendant company to re-instate the payments but was unable to do so after March 1st, 1933, until he had employed his attorney and had elected to treat the unequivocal refusal of the company to pay as a breach of the contract and was therefore entitled to maintain his suit, (authorities *supra*).

VI.

ARGUMENT.

(Point "A"). First. The decision of the court below is contrary to and in conflict with prior decisions of this

court. We respectfully call the courts attention to the case of *Roehm* v. *Horst*, 178 U. S. 1, where a full and complete discussion by this Court of the law governing the instant case is found.

Pearce v. *Tenn. Coal & Iron R. R. Co.*, 173 U. S. 1.
Lovell v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264.

In the *Roehm* case the Court said:

> " • • • And also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly." • • •
>
> "It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind." • • •
>
> "The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." • • •
>
> "Its real operation appears to be to give the Promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by

the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such." * * *

"In *Anvil Min. Co.* v. *Humble*, 153 U. S. 540, 38 L. Ed. 814, 14 Sup. Ct. Rep. 876, performance had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the court, said: 'Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.'"

In the *Pearce* case the Court said:

"But the recent tendency of judicial decisions in this country, in actions of contract, as well as in actions of tort, has been towards allowing entire damages to be recovered, once for all, in a single action, and thus avoid the embarrassment and annoyance of repeated litigation."

The facts making the foregoing principles of law applicable to the present record will be referred to and pointed out hereinafter.

(Point "A".) Second. The decision of the Circuit Court of Appeals in the instant case is in direct conflict with the following decisions of other circuits:

Sixth Circuit:

Federal Life Ins. Co. v. *Rasco*, 12 F. (2d) 693.

Eighth Circuit:

Mutual Reserve Fund Life Assur. Co. v. *Farrenbach*, 75 C. C. A. 304, 144 F. 342.

Colorado Yule Marble Co. v. *Collins*, 144 C. C. A. 376, 230 F. 78.

United Press Assn. v. *National Newspaper Assn.*, 150 C. C. A. 429.

Ninth Circuit:

Ætna Life Ins. Co. v. *Gehr*, 50 F. (2d) 657.

Tenth Circuit:

Prudential Ins. Co. of Am. v. *Faulkner*, 68 F. (2d) 676.

The *Rasco* case, *supra*, is absolutely on all fours with the instant case and was correctly decided by that Circuit. As held in that case and in the decisions of this Court, *supra*, the petitioner had the right of an election and when he elected to treat the unequivocal refusal to pay as a breach of the contract then the defendant company could not deprive him of that right by tendering him the amounts that were past due. After the promisor has unequivocally declined performance at a time when the promisee is entitled to performance it cannot thereafter change its mind over the objections of the promisee. This announcement is supported by the authorities hereinbefore cited and by the following authorities:

Ætna Life Ins. Co. v. *Gehr*, 50 F. (2d) 657.

Avery v. *Boden*, 5 E. L. & B. L. 714.

Barrick v. *Buba*, 2 C. B. N. S. 563.

Benjamin v. *Hilliard*, 23 Howard 149.

Carnig v. *Carr*, 167 Mass. 544, 35 L. R. A. 512.

Corpus Juris, Vol. 13, Section 725, page 651.

Daniels v. *Newton*, 114 Mass. 530.

Danube & B. S. R. R. Co. & K. Harbour Co. v. *Xenos*, 11 C. B. N. S. 825.

East Tenn. V. & G. R. R. Co. v. *Staub*, 7 Lee 397.

Grau v. *McVicker*, 8 Bliss 13, Fed. Case 5708.

Hancock v. *New York Life Ins. Co.*, Fed. Case 6011.

Hinckley v. *Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 30 L. Ed. 967.

Hochster v. *DeLa Tour*, 2 E. L. & B. L. 678.

Indiana Life Endowment Co. v. *Reed*, 54 Ind. App. 450, 103 N. E. 77.

Knisely v. *Leathe*, 256 Mo. 341, 166 S. W. 257.

Miburn v. *Royal Union Mutual Life Ins. Co.*, 209 Mo. App. 228, 234 S. W. 378.

Nichols v. *Scranton Steel Co.*, 137 N. Y. 487, 33 N. E. 566.

Pakas v. *Hollingshead et al.*, 184 N. Y. 211, 77 N. E. 40.

Parker v. *Russell*, 133 Mass. 74.

Reid v. *Hoskins*, 6 E. L. & B. L. 593.

Schell v. *Plumb*, 55 N. Y. 592.

Travelers Protective Assn. of Am. v. *Stevens*, 49 S. W. (2d) 365.

Vicksburg & M. R. R. Co. v. *Putnam*, 118 U. S. 545, 30 L. Ed. 257.

POINT "B"

The facts justifying the application of the principles of law hereinbefore set out are shown by the record as follows:

On March 1st, 1933, the defendant company wrote petitioner that it would no longer make any payments. (Record 159.) On March 6th, 1933 petitioner replied that he was taking steps to secure his benefits under the policies. (Record 101.) On March 9th, petitioner's attorney wrote the

company that he had been employed to represent petitioner and made demand on the company for payment in full under the policies for the remainder of petitioners natural expectancy. (Record 161.) On March 17th, 1933 the defendant company replied to said attorney it would adhere to its former decision. (Record 162-163.)

At the time defendant company declined to make payment of the disability benefits it had the knowledge in its files that petitioner had been continuously disabled since December, 1930, and that although it had theretofore declined to make payments it later reinstated the payments after petitioner had threatened suit against it and had found the reports of its own doctor were erroneous. (See letters record 71, 73, 74, 79, 80, 84, 86, 87, 88, 90, 92, 93, 95, 96). At the same time it also had in its possession letters from the appellant himself stating his condition. (Record 98, 99, 110, 116, 126, 148, 149, 152, 153, 154). It had the reports of the doctors on his condition which showed total disability, (Record 118, 119, 124, 131, 132, 138, 139, 155, 156, 157, 158).

We especially call the Court's attention to the reports of Dr. Beck and Dr. Dossett, (Record 144) dated May 4th, 1932, in which Dr. Beck tells them at that time that appellant was suffering with his heart. Also, letter of Dr. Dossett of May 12th, 1932, (Record 144, 145, 146).

The foregoing reports will show that petitioner was totally and permanently disabled and that the company without any reason or justification whatever declined to make any further payments and went so far as to lapse one of the policies and applied the value to paid up insurance, which policy, under that feature of it did not give disability benefits. (Record 10). The analysis of the record therefore is this:

(1) Petitioner was totally and permanently disabled since December, 1930, and was entitled to performance of the contract when the defendant breached it.

(2) The contract embraced mutual obligations. The company could demand the furnishing of proof of his continued disability and was therefore not an executed contract.

(3) It unequivocally refused payment at a time when plaintiff was entitled to performance and it did not notify him why it was refusing nor did it demand or request additional proof before it refused payment.

(4) Petitioner elected to treat the refusal as a breach and sue for damages, the measure of which was the present cash value of the benefits provided by the policy computed over his life expectancy.

VII.

Conclusion.

It is therefore respectfully submitted that the District Court erred in giving the preemptory instruction and the Circuit Court of Appeals was in error in affirming the judgment.

The facts show that plaintiff was totally and permanently disabled and the company refused to perform when under its contract it was required to do so. It admitted the validity of the contract but unequivocally refused to perform.

This is a case therefore that we respectfully submit calls for the exercise by this Court of its supervisory powers in order that the law may be settled finally wherein such confusion between the various Circuits and the various state Courts now exists, and in order that the errors complained of herein may be corrected, that a writ of certi-

orari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Fifth Circuit and finally reverse it.

Respectfully,

SIDNEY C. MIZE,
R. W. THOMPSON, JR.,
WEBB M. MIZE.
Counsel for Petitioner.

(6045-C)